IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITON NO.2262 OF 1991

Ajay Oxycholoride Floorings, a Parntership firm carrying on business agt 24, A.B. old Anjirwadi, Mount Road, Mazgaon, Mumbai - 400 010. ..Petitioner.

V/s.

1. Mr.Iyer, Assistant Commissioner Commissioner of Income-tax, Circle 24(2), Piramal Chambers, Lalbaug Parel, Mumbai-400 012.

2. A.Balasubramian, Commissioner of Income-tax, Bombay City XII, Bombay having his office at Piramal Chambers, Parel, Bombay - 400 012

3. Union of India ..Respondents.

Mr.Firoze B.Andhyarjuna, senior counsel with P.J.Pardiwalla and Ms.Rajni Dirkar i/b. Little & Co. for petitioner.

Dr.P.Daniel i/b. Pankaj Kapoor for respondents.

CORAM : V.C. DAGA AND J.P.DEVADHAR, JJ.

DATED : 16TH AUGUST, 2005.

ORAL JUDGMENT (PER V.C.DAGA, J.)

1. This petition is directed against the two

notices dated 20th February, 1990 (Exhibit-E & E-1) and notice dated 3rd June, 1991 (Exhibit-G) whereby the power to reopen the completed assessment has been invoked.

THE FACTS :

2. The petitioner after the receipt of the above notices requested the Assistant Commissioner of Income Tax, Circle 24(2), Piramal Chambers, Bombay to provide or disclose reasons recorded by them prior to issuance of notices for reopening the assessment. No reasons were disclosed or supplied by the Assistant Commissioner of Income Tax in spite of request letter dated 8th June, 1991. Consequently, the petitioner was left with no option but to invoke the writ jurisdiction of this Court under Article 226 of the Constitution of India to challenge the action of reopening and the notices issued by the respondent-Income tax department to the petitioner-assessee.

3. This Court was pleased to issue rule in the above petition on 15/7/1991 with interim relief in terms of prayer clause (d).

4. On being noticed, the respondents appeared

and filed their counter affidavit on 4th February, 1998 and disclosed reasons recorded by The Assistant Commissioner of Income Tax, Cir-24(2), City-X, Mumbai for reopening completed assessments, the reasons read as under :-

" Assessment year - 1983-84

The then 11th ITO, BSD(S), bombay, vide his order dt.27.3.86 in the case of M/s.Shah & Associates has assessed income of Rs.3,61,961/- on protective basis holding that the income in question is assessable in the hands of the assessee.

Assessment year - 1984-95

The then 11th ITO, BSD(S), Bombay, vide his order in the case of M/s.Shah & Associates has assessed income of Rs.8,33,800/- on protective basis holding that the income in question is assessable in the hands of the assessee. "

SUBMISSIONS :

5. The petitioner has also challenged the legality of the reasons recorded. With the aforesaid material on record, the parties to the petition were heard.

6. Mr.Andhyarjuna, the learned senior counsel appearing for the petitioner -assessee submits that the reasons recorded do not disclose any material to show that the income has escape assessment. No material is

available on record to justify the formation of belief; no allegations alleging failure on the part of the petitioner to disclose any particular material resulting in escapement of income is to be found in the reasons recorded. Mr.Andhyarujina further submits that the power to reopen has been exercised after a period of 4 years from the end of assessment year. That, if the power to reopen is to be exercised by the assessing officer after the period of 4 years from the end of the assessment year, then it is incumbant on the part of the department to allege failure on the part of the assessee to disclose material resulting any escapement of the income. He further submits that no reopening is permissible on the basis of the change of opinion.

7. Mr.Andhyarujina, in order to substantiate his submissions advanced, placed reliance on number of Judgments of this Court including that of **Hindustan Lever Ltd. V/s. R.B.Wadkar [(2004) 268 I.T.R.332]** and pressed into service the observations of this Court quoted hereinbelow:-

> " The reasons recorded by the AO nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons

are required to be read as they were recorded by the AO. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the AO to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the AO to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the AO to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the AO. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The AO, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the AO cannot be supplemented by filing or making oral submissions, otherwise, the reasons which were lacking in material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced.

8. Mr.Andhyarjuna, also relied upon another Judgment of this Court in the case of **Cafrihans Indian Ltd. V/s. Tarun Seem, Dy.Commissioner of Income-tax & Ors. [(2004) 266 I.T.R. 566]**. He also relied upon another Judgment of this Court in the case of **ICICI**

Bank Ltd. V/S. K.J.Rao [268 I.T.R.303] and place reliance particularly on para 12 of this Judgment which reads as under :-

" Under section 147 of the I.T. Act, concluded assessments can be reopened beyond a period of 4 years from the end of the relevant assessment years only if there is failure on the part of the assessee to disclose fully and truly all material facts necessary for the purpose of assessment. Having furnished all material facts even if an assessee erroneously claims higher depreciation, it will not be a case of failure to disclose fully and truly all material facts. At what rate the depreciation is to be claimed is a matter of legal inference to be drawn from the material facts. If the legal inference drawn from the material facts is erroneous it cannot be said that there is failure on the part of the assessee to disclose material facts. In the present case, on the material facts disclosed, the assessee had claimed depreciation at 40% and the same was allowed by the assessing officer. It is not the case of the revenue that the facts disclosed by the assessee were incorrect or that there were any other facts which were material for the assessment which have not been disclosed by the assessee. Under the circumstances, if there is no failure to disclose material facts, then, even if there is excess relief granted, the assessments cannot be reopened beyond the period of 4 years from the end of the relevant assessment years. This Court in the case of IPCA Laboratories Ltd. (supra) and in the case of Bhor Industries (supra) has held that notice for reopening of the assessment cannot be issued after a period of 4 years unless the escapement of income is on account of failure on the part of the assessee to disclose fully and truly all material facts. It has been further held that the explanation to section 147 of the I.T.Act has to be read with section 148 of the I.T.Act in its entirety. In the light of the aforesaid decisions, in the present case, there being no failure on the part of the assessee to disclose fully and truly all material facts, the impugned notices issued beyond the period of 4 years from the end of the relevant assessment years are liable to be held to have been issued in

contravention of the provisions of the Income Tax Act."

(emphasis supplied)

9. Mr.Andhyarujina, thus, prayed for setting aside notices with all consequential reliefs prayed in this petition.

10. Per contra, the learned counsel appearing for the respondent - Income Tax department urged that the writ petition at the instance of the petitioner is not maintainable as alternate remedy is available to the petitioner. Relying upon the decision of the Apex Court in the case of **G.K.N.Driveshaft (259 I.T.R. 19)**, it was submitted that the assessee must agitate the issue before the assessing officer and not before this Court. He also tried to support the action of the department, however, he could not take his submission to its logical end.

CONSIDERATION :

11. We have heard rival parties. When asked, how alternate remedy could have been resorted to by the assessee without knowing the reasons recorded for

reopening, learned counsel for the Revenue conceded that in absence of communication of the reasons; the assessee could not have resorted to alternate remedy. He thus agreed that in the facts and circumstances of the case it was open for the petitioner to invoke writ jurisdiction of this Court.

12. So far as the power invoked by the assessing officer to reopen assessment beyond the period of 4 years as urged by the petitioner is concerned, the learned counsel for the Revenue could not justify the reopening based on the material available on record. He fairly conceded that reopening is beyond the period of 4 years from the end of the assessment year and no circumstances justifying such reopening beyond four years is available on record. Since the reopening is beyond the period of 4 years, in the absence of any material to show that there is failure on the part of the assessee to disclose fully and truly all material facts, the reopening of the assessment cannot be sustained. The reasons recorded for reopening the assessment do not state that there is any failure on the part of the assessee to disclose fully and truly any material facts. Mere fact that a protective assessment has been made in the case of some other

assessee on the ground that the income of that assessee is assessable in the hands of the assessee herein cannot be a ground to reopen the concluded assessment of the assessee. Since the conditions required for reopening the assessment beyond the period of 4 years are not satisfied, in the facts of the present case, in our considered view, the notices issued are without jurisdiction and the same are liable to be quashed and set aside on this short ground. Since we are setting aside the notices on this ground alone, it is not necessary for us to go into other number of points; which Mr.Andhyarjuna has raised.

CONCLUSION :

13. In the result, the petition is allowed. impugned notices are quashed and set aside. rule is made absolute in terms of prayer clauses (a), (b) & c) of the petition with no order as to costs.

(V.C. DAGA, J.)

(J.P.DEVADHAR, J.)